

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DALE GENE SCOTT
Claimant

VS.

**FLOOR MARKET & DECOR INC.,
PAYNE'S FLOOR COVERING,**
Respondent

AND

COMMERCIAL UNION INSURANCE
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket Nos. 187,362
190,329

ORDER

THE respondent, Payne's Floor Covering, appeals from the Preliminary Hearing Order entered by Administrative Law Judge George R. Robertson dated August 15, 1994. The Appeals Board heard oral argument on October 11, 1994.

APPEARANCES

Claimant appeared by his attorney, Stephen A. Hilgers of McPherson, Kansas. The respondent, Floor Market & Decor, Inc., and its insurance carrier, Commercial Union Insurance, appeared by their attorney, Kendall R. Cunningham of Wichita, Kansas. The respondent, Payne's Floor Covering appeared by its attorney, Edward D. Heath Jr. of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Robert A. Anderson of Ellinwood, Kansas. There were no other appearances.

RECORD

The record consists of the documents filed of record with the Division of Workers Compensation in these docketed matters and is the same as that considered by the Administrative Law Judge.

ISSUES

The Administrative Law Judge found, for preliminary hearing purposes, claimant was entitled to temporary total and medical benefits for a work-related accident that occurred during his employment with Payne's Floor Covering with payment to be made by the Kansas Workers Compensation Fund. The respondent, Payne's Floor Covering, requested this review. The parties requested the following issues be addressed by the Appeals Board:

- (1) Whether claimant met with personal injury by accident arising out of and in the course of his employment.
- (2) Whether claimant was an employee or independent contractor on the date of the accident. If an employee, who was the employer?
- (3) Did the alleged employer, Payne's Floor Covering, meet the payroll requirements of K.S.A. 44-505, as amended?
- (4) Did the Administrative Law Judge err by ordering the Workers Compensation Fund to pay benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board, for purposes of preliminary hearing, finds:

For the reasons expressed below, the Preliminary Hearing Order of Administrative Law Judge George R. Robertson dated August 15, 1994, is affirmed in all respects.

(1) The claimant, Dale Gene Scott, met with personal injury by accident arising out of and in the course of his employment with the respondent, Payne's Floor Covering, on February 7, 1994, when he was loading carpet and pad into Mark Payne's van. Claimant's description of the accident is credible, persuasive, and uncontroverted.

(2) At the time of the accident, claimant was employed by Mark Payne dba Payne's Floor Covering. Claimant began working for Mark Payne and Payne's Floor Covering in June of 1992, when he answered a help wanted ad. Claimant primarily assisted Mark Payne and Randy Kreihbel lay carpet. Although Mark Payne followed the instructions of his accountant and attempted to create the relationship of independent contractor between himself and claimant, Mr. Payne retained the all-important rights to both control and terminate the claimant. Mark Payne directed claimant's work, controlled the hours he worked, and controlled the hourly rate of pay he earned. In addition, Mark Payne wanted advance notice of vacations, notice of illness, and testified that he would replace claimant if he showed up late to work.

(3) The respondent, Payne's Floor Covering, cannot now allege, for the first time, that it did not have sufficient payroll to be subject to the provisions of the Workers Compensation Act. The Appeals Board has carefully reviewed the statements made by the parties at the Preliminary Hearing. The Appeals Board finds that Payne's Floor Covering stipulated to a payroll sufficient to bring the parties under the provisions of the Act in the event claimant was found to be an employee. The respondent cannot now raise an issue before the Appeals Board that was not an issue before the Administrative Law Judge.

(4) The Workers Compensation Fund contends the evidence is insufficient to prove Payne's Floor Covering is insolvent, and, therefore, the Administrative Law Judge erred in ordering benefits to be paid by the Fund. Because this finding does not exceed the jurisdiction of the Administrative Law Judge, it is not one which is subject to review under K.S.A. 44-534a relating to preliminary hearings, nor one which is part of a final order

subject to review under K.S.A. 44-551, the Appeals Board lacks the authority and jurisdiction to review same.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge George R. Robertson, dated August 15, 1994, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of November, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Robert A. Anderson, Attorney at Law, Ellinwood, KS
Kendall R. Cunningham, Attorney at Law, Wichita, KS
Stephen A. Hilgers, Attorney at Law, McPherson, KS
Edward D. Heath, Attorney at Law, Wichita, KS
George R. Robertson, Administrative Law Judge
George Gomez, Director